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80-1191

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM R. BURT,

Petitioner,

vs.

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO; HENRY F. McQUADE, Chief Justice; JOSEPH J. McFADDEN, CHARLES R. DONALDSON, ALLAN G. SHEPARD and ROBERT E. BAKES, in their official capacities; THE IDAHO STATE BAR, a professional association; GERALD W. OLSON, THOMAS A. MITCHELL, LOUIS H. COSHO, MACK A. REDFORD, DEAN E. MILLER, JOHN M. SHARP, JOHN H. BENGTSON, THOMAS G. NELSON and RONALD K. KULL, Commissioners, former Commissioners and Officers of the Idaho State Bar Association, individually and in their official capacities; and ROBERT E. RAYBORN, individually and as a member of the Idaho State Bar,

Respondents.

ON WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is it proper to confine the Federal remedy for "a claim that a state wrongfully denied a particular applicant admission (to its bar) without regard to the basis on which the individual claim is based" to direct appeal to the Supreme Court under 28 U.S.C. § 1257, and to hold that under no possible circumstances does a Federal District Court have jurisdiction under statutes such as 28 U.S.C §§ 1331 and 1343 to review such a claim by a bar admission applicant?

2. Is it relevant to the above procedural concept that Petitioner's challenge in the District Court was from an order of the Commissioners of the Idaho State Bar denying his application to practice law in Idaho (App. 4); and that the commissioners are elected by the Bar

members, and neither appointed by Idaho's Supreme Court nor on their assuming office, even subject to the Court's approval (App. 9)?

3. Does the fact that, at the time the Idaho State Bar drew up and administered the admission examination in August 1972, the Bar was engaged in a conspiracy to restrain competition in the practice of law in Idaho (evidenced by its published fee schedule (App. 5) and the fact that only 38 out of 86 applicants were given passing grades by the Bar) constituted a denial of an individual applicant's (Petitioner's) right to an examination, free from fraud or other illegal taint, which right is protected by the United States Constitution (as well as, because of the nature of this conspiracy, by the Sherman Act)?

4. Was it proper to dismiss an entire cause of action (Second) solely on the jurisdictional ground of absence of subject matter jurisdiction, when the facts set forth in the statement of the cause (i.e., denial of civil rights and rights protected by the United States Constitution) contained not only a summary of the abuses in the bar admission examination process as they impacted on this individual Petitioner, but also set forth facts relating to peripheral matters substantiating specific malice controlling Defendants' (Supreme Court Justices and Bar Commissioners) acts as they, as well as the rigged examination, caused damage to Petitioner in violation of his constitutional rights (Fourteenth Amendment)? The Record on Appeal and the Brief and Reply Brief filed in the Court of Appeals pointed out that both in the District Court

and the Court of Appeals, the relief sought in the Second Cause was not even confined to proceedings under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 alone but also invoked 28 U.S.C. § 1331, as well as asserting causes of action arising directly from the protection of the United States Constitution itself?

5. a) Is it not a denial of due process as delineated in Goldberg v. Kelly, 397 U.S. 254, 270 (1970) for the Courts and Bar Association in Idaho to be able to rely on Idaho Code 3-408 (App. 9) to have Bar members alone authorized to make determinations relating to a fellow Bar member and adverse to laymen, when such determination materially affects the outcome of litigation in the courts in Idaho to which only laymen are parties?

b) Should the problem be dealt with as an unconstitutional delegation of functions by the courts in Idaho? In Lathrop v. Donohue, 367 U.S. 820 (1961), Justices Harlan (at 855) and Douglas (at 878, fn 1) also raised other questions as to permitting a state integrated bar to have self-governing powers, without ever going so far as having the bar association usurp powers of the courts so as to preclude litigants from being able to create a record in the trial court and to have the trial court make all factual determinations based on such record which are essential to adjudicating causes before the court. Is not such a record in the trial court necessary for effective appeal to the state's appellate court?

6. The Complaint in this action was filed on January 20, 1976 and Plaintiff

invoked 29 U.S.C §§ 2281 and 2284 for the convening of a three-judge District Court because a permanent injunction restraining the enforcement, operation or execution of statutes in the State of Idaho was a part of the remedy sought. In view of the provision of the "Act of August 12, 1976" that "[t]his act shall not apply to any action commenced on or before the date of enactment" (P.L. 94-381, 90 Stat. 1119), is not Plaintiff entitled to the convening of a three-judge District Court to hear and to determine this cause?

7. Is not Plaintiff entitled to the granting of his Motion for a Partial Summary Judgment made in the District Court (R-352-55) [1/] and renewed in the Court of Appeals on the issue of the

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1/ References are to pages of Record on Appeal filed in the Supreme Court at the request of Petitioner.

existence of a conspiracy to restrain competition in the practice of law in Idaho when the existence of a minimum fee schedule promulgated and periodically revised by the Idaho State Bar (named as a Defendant in the Complaint), in violation of §§ 1 and 2 of the Sherman Act (complete schedule is set forth in App. 5 and the Record on Appeal, R-171-177A), and the members of the Supreme Court of Idaho (additional Defendants herein, in official capacity only, and not subjected to claims for damages) have stated in the record that such minimum fee schedule "was neither sponsored nor sanctioned either by the State of Idaho or the Idaho Supreme Court, nor did it have any enforceable effect through these agencies." (R-105)

8. Inasmuch as Petitioner (Appellant in Court of Appeals) had alleged in the District Court (R-256) and in the

Court of Appeals that under the Tenth Amendment to the United States Constitution (and the equivalent provision of the Idaho Constitution, Act 1, Section 21) that while the legislature of Idaho could create the Idaho State Bar, it had no valid power to endow such bar with monopoly power, was not Petitioner entitled to a determination by the Court of Appeals as to the validity of such contention? The Court of Appeals should have rendered an opinion on this constitutional issue [2/] in view of the fact that none of the Appellees challenged the appropriateness or accuracy of Appellant's position on this constitutional issue and the fact that Petitioner had been able to cite solid authority for his position (Substitute Brief of Appellant, pp. 62-8, Reply Brief at p. 1).

2/ Issue raised in District Court as well as in Court of Appeals.

9. Is this not the time in the history of the United States to use the Federal judicial power to assure free mobility to lawyers (and other professionals) to move the site of their practice from state to state to assure lower cost to the public in legal services (R-250)?

10. In the face of motions by Petitioner under 28 U.S.C. §§ 144 and 455(b)(1), is it proper to have a Federal District Court Judge, who was a member of the conspiracy to violate the Sherman Act while in private practice (and thus, possesses personal knowledge of disputed evidentiary fact), preside over the Sherman Act conspiracy trial or the trial intended to protect Petitioner from invasion of his rights under the United States Constitution, which invasion arose directly from the conspiracy to violate

the Sherman Act?

11. Does not effective access to the Federal Courts provided by the United States Constitution require that in suits to protect personal rights assured by the Constitution, persons 60 years of age and older be granted priority in the adjudicating process so that their rights may be meaningfully protected while they are alive?

12. a) When the allegations of the Complaint contain substantial allegations that the Justices of the Supreme Court of Idaho have acted officially in a manner to invade rights protected by the United States Constitution and in conflict with federal statutes (i.e., the Sherman Act as discussed in Cal. Ret. Liquor Dealers Assn. v. Midcal Alum., 100

S.Ct. 937, 946 (1980)), is it not clear that they are subject to Article VI, Clause 2, which specifies "and the Judges in every State shall be bound thereby," as interpreted in Martin v. Hunter's Lessee, 1 Wheat, (14 U.S.) 304, 335 (1816), stating that the obligation to abide by federal law "is imperative upon the state judges, in their official and not merely their private capacities," and thus, subject to the judicial power of all Article III courts to assure their compliance with federal law? See Supreme Ct. of Va. v. Consumers Union, 100 S.Ct. 1967, 1976 (1980).

b) Does the Court of Appeals opinion go far enough when it states merely that "we believe it premature to pass upon the immunity of the Justices of the Supreme Court of Idaho?"

LIST OF PARTIES

All parties are named in the caption.

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OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals and its Order Denying Rehearing are not yet reported but appear in the Appendix hereto (App. 1 and 2) along with the District Court's Judgment (App. 3).

Petitioner has requested the Clerk of the Court of Appeals to file the Record on Appeal in this Court pursuant to Rule 19.1.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

Review is sought for the Court of Appeals Memorandum Opinion, which was filed October 10, 1980 and the Order Denying Rehearing, filed October 30, 1980 (App. 1 and 2) in this Court under the authority of 28 U.S.C. § 1254, with additional relief sought under 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Texts in Appendix)

United States Constitution

a. Art. I, Sec. 8, Clause 3 (Commerce Clause)

b. Art. IV, Clause 1 (Full Faith and Credit)

c. Art. IV, Clause 2 (Comity)

d. Art. VI, Clause 2 (Supremacy)

e. Tenth Amendment (Reserved Powers)

f. Fourteenth Amendment (Due Process)

United States Statutes

a. 15 U.S.C. § 1

b. 15 U.S.C. § 2

c. 28 U.S.C. § 455(b)(1)

d. 28 U.S.C. § 1257

STATEMENT OF THE CASE

The Complaint was filed in this action on January 20, 1976 in the Federal District Court in Idaho (Civ. 1-76-22) and is an amplified version of a class action complaint filed on November 17, 1972 in the same District Court (Burt v. McQuade. Civ. 1-72-147), challenging the results of a bar admission examination prepared and administered by the Idaho State Bar in August 1972. The Complaint filed in 1972 was on behalf of the 48 applicants (38 out of 86 passed) who were notified by the Idaho State Bar that their application to practice law within the State of Idaho was denied by the Board of Commissioners of the Idaho State Bar because of failure to pass the Idaho State Bar Examination. (The notice received by Petitioner was dated September 25, 1972 and was signed "By Order of the Commissioners of the Idaho State Bar.") (App. 4.)

Inasmuch as there was only a limited scope under which the action of the Bar could be reviewed by the Supreme Court of Idaho (under its Rule 112 (App. 8)),the original federal action was commenced without waiting for the results of any petitions to the Supreme Court of Idaho. It was terminated after the Attorney General of Idaho, who represented the Supreme Court in the Civ. 1-72-147 action, advised counsel for the Plaintiff that their firm might be destroyed by his client deciding appeals against their firm unless they terminated their action before the Supreme Court of Idaho filed its answer. The suit was dropped without any stipulation protecting the Plaintiff, but without prejudice and without refunding any of Petitioner's $3,000.00 contributed toward this class action.

Petitioner reported the above. "threat" emanating from the Attorney

General of Idaho to the United States Department of Justice and also called the Department's attention to the existence of an Advisory Fee Schedule (App. 5) provided by the Bar to its members (July 1971 Revisions then in force, originally issued in 1959), which contained in its preamble, "[i]n cases of unreasonably low fees... an attorney is guilty of unethical solicitation of practice" as confirming the existence of a conspiracy to restrain the practice of law in Idaho, in violation of the Sherman Act (Secs. 1 and 2). Not until the Idaho State Bar received notice from the Department of Justice in April 1973 that the Bar was being served a civil investigative demand covering the price-fixing and the use of admission examinations for illegal economic objectives did it withdraw the published schedule.

The present Complaint is broken down into three broad causes of action:

First Cause of Action: Basically, a class action on behalf of all persons 55 or older who wish to move their law practice from sister states to Idaho, based on scientific principles that have been demonstrated by federally-financed studies that beginning at age 50, one's speed in matters such as written examinations declines, even though one's power or ability in the field such as law may increase. The examination administered to Petitioner took three full days under strict time limitations and was graded on the same basis as those of students newly graduated from law school. Hence, the examination as administered by the Idaho State Bar precluded fair or rational results. For purposes of standing, the personal impact on Petitioner had to be set forth even though the cause is on behalf of all older attorneys desiring to move their practice from sister states

to Idaho.

Second Cause of Action: An individual cause of action also under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 1343(3) (in the proposed Amended Complaint, 28 U.S.C. § 1331 and directly from the Constitution were added) based on the impact of the irrational examination procedures on Petitioner and peripheral events demonstrating either specific malice toward Petitioner or acts in furtherance of a conspiracy and related invasions of Petitioner's rights protected by the United States Constitution,[3] such as: (Details in Complaint R-17-19.)

a. Improper interference by the Attorney General of Idaho in the original federal litigation (Civ. 1-72-147).

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[3] As retaliation because Petitioner was challenging and threatening to expose the Bar's conspiracy to violate the Sherman Act.

b. Correspondence by the Idaho State Bar with Martindale-Hubbell in New York for the purpose of interfering with Petitioner's "a.v." rating (the highest) in New York and to prevent having it transferred to Idaho.

c. In Van Houten v. Burt, 505 P.2d 333 (1973), arising from the construction in 1964 of Petitioner's second or vacation home in Idaho, the Idaho District Court had on its own initiative referred Burt's allegations that his attorney (Walker) had misrepresented timely filing of a Notice of Appeal to the Idaho State Bar for investigation (App. 6, Court's letter to Burt dated August 30, 1971). The Bar took no effective investigative action (even though Petitioner filed a Complaint as suggested by the Idaho Court) because, as the investigating attorney stated, the case was on appeal to the Idaho Supreme

Court. The Supreme Court dismissed the appeal because it was not timely.

When Burt complained to the Bar about the circular procedure denying him due process stemming from its lack of investigation of Walker's conduct, its President wrote to Burt (App. 7): "As I told you subsequently, we will again consider your complaint after all pending litigation has been terminated." The reference is to Burt v. McQuade, et al., Civ. 1-72-147), then pending in the Federal District Court in Idaho, and the inaction has continued during the pendency of the present action now before this Court.

The Van Houten appeal was pending before the Idaho Supreme Court (argued by Burt, September 19, 1972, rehearing denied February 1, 1973) at the time that Court was considering Burt's allegations in its

Docket No. 11174. Burt's Petition under the Idaho Supreme Court's Rule 112 (App. 8) was filed September 28, 1972, and the Sherman Act allegations were added October 16, 1972, stating that during the August 1972 examination, the Bar was engaged in a conspiracy to violate the Sherman Act, which constituted "malice" (one of the limited bases for review under Rule 112* of the Idaho Supreme Court). The Court found "no malice" on March 13, 1973.

The specific malice of the Idaho Supreme Court was disclosed in Van Houten in its recitation of the procedural steps. In order to conclude that the appeal was not timely, the Court had to ignore the fact that the District Court

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* App. 8, at A-20.

had amended its Judgment[4/] and that, in fact, the Notice of Appeal was timely (despite Walker's misrepresentation and misconduct regarding failure to file a notice of appeal from the original Judgment). The original Judgment was amended August 19, 1972, and a motion for reconsideration was filed within 10 days of entry of the Amended Judgment; thereby tolling the 60 day notice of appeal period until September 28, 1971, when the motion was denied, and the Notice of Appeal was filed on November 22, 1971). Idaho has

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4/ Awarding Plaintiff's attorney in the lien action additional fees after denying Petitioner's motion that the Court rather than the Bar determine the cause for Walker's failure to file any notice of appeal within the time permitted and then misrepresenting that first one had been filed and then subsequently that filing had been omitted as the result of the Clerk's mistake and oversight. Under Idaho law such fees are a part of the damages, not costs.

adopted the Federal Rules of Civil Procecure with minor variations not related to the issues raised herein.

Mr. Campion, law clerk for Justice Shephard who wrote the opinion in Van Houten, confirmed to Petitioner that omitting the date of the Amended Judgment from the opinion was deliberate because the Court was result-oriented and desired that Petitioner (Appellant herein) lose on his appeal because Petitioner was "rocking the boat" by his attack on the conspiracy to violate the Sherman Act. This result could only be achieved by a procedural gimmick because Petitioner was certain to prevail if the appeal was decided on its merits. To prevent disclosures of the above, the Idaho Supreme Court quashed subpoenas served on Justice Shepard and Mr. Campion by the Idaho State Bar, even though the Board of Commissioners

under Idaho Code § 3-408 has authority to investigate and pass upon all complaints that may be made concerning the professional conduct of any person admitted to the practice of law.

The Court's action in Van Houten served to damage some and to threaten all Petitioner's property rights in Idaho in retaliation for and as a warning against pressing further for disclosure of the conspiracy to violate Federal laws. It was the Idaho State Bar, not Petitioner, that tied State action in Van Houten to the fact that Petitioner was seeking relief in the Federal Courts (App. 7). 5/

The Van Houten result is so gross as to be impossible in a rational

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5/ The Court and clique controlling the Bar in Idaho was substantially the same as those permitting the unsavory abuse of legal process reported in "The Boys of Boise" (by J. Gerassi, an editor of "Time", Macmillan Co. 1966 at p. 19.)

administration of justice. Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 30 (1917).

Under Idaho law, a finding that an attorney had misrepresented as to his timely filing a notice of appeal would have required the trial court to refile its judgment so that the running of the time for filing a notice of appeal would start afresh. Andrus v. Irick, 394 P.2d 304 (Idaho 1964).

On February 15, 1973, after the illegality of the bar's fee schedule under the Sherman Act had been called to the Court's attention [6/] in the Docket 11174 proceedings, the Supreme Court of Idaho issued its opinion in Realty West v. Thomas, 506 P.2d 830, 832 (1973), approving

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6/ Supported by reference to a warning to State bars originating in the U.S. Department of Justice and published in the CCH Trade Regulation Reporter, para. 50,131, pages 55,215-6.

the taking of judicial notice of the bar's minimum fee schedule in awarding legal fees and thus challenging Federal authority as set forth in Article VI, Clause 2.

Third Cause of Action: Based on 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337, Petitioner set forth the manner in which he had been personally damaged by the conspiracy of all the Defendants (Respondents herein) to violate Sections 1 and 2 of the Sherman Act, such as denial of employment to practice law in Idaho.

When the press subsequently quoted the Executive Director [7] of the Idaho State Bar as appeared in the following excerpt in the Idaho Statesman for July 26, 1976 on its page 1:

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[7] Mr. Kull, a Respondent herein.

> "A copy of the old schedule cold not be located in the Idaho State Law Library, several attorneys' offices and Idaho State Bar headquarters.
>
> "I ordered all fee schedules filed in our offices destroyed. I didn't want to have to explain to the Justice Department why we had the fee schedules in the office." (R-316.)

a motion was made to expand the Complaint to a class action to recover damages from the inception of the conspiracy in 1959 because in view of the concealment, the four-year statute of limitations would have been tolled. Further, because the Attorney General of Idaho was appearing through his deputies as counsel for the Supreme Court, he was not free to act to protect the public under 15 U.S.C. § 15(c)-(e) authorizing State Attorneys General to file class action suits on behalf of citizens of the state.

Included in the Third Cause was a claim based on a demand by a member of the Idaho State Bar (Rayborn) that he be paid a full fee, in accordance with the minimum fee schedule applicable to the filing of the mechanic's lien, or he would not permit his client to settle a lien claim against Petitioner. The Van Houten litigation discussed above resulted from the Petitioner's refusal to accede to Rayborn's demands made in September of 1965.

The Federal District Court in Boise dismissed the First and Second Causes of Action upon the sole authority of MacKay v. Nesbett, 412 F.2d 847 (1969), 285 F. Supp. 498 (1968) and the Third Cause of Action because "there is no showing that there is the kind of effect on interstate commerce by the allowance of attorneys fees in the statutory lien foreclosure case."

The Court of Appeals for the Ninth Circuit has reversed and remanded as to the First and Third Causes of Action, but has upheld the dismissal of the Second Cause of Action solely upon the authority of MacKay v. Nesbett, supra, as amplified in Brown v. Bd. of Examiners, et al., 623 F.2d 605 (July 18, 1980). This Petition seeks review of the dismissal of the Second Cause of Action.

MacKAY ASPECT

As late as May 8, 1980, the Ninth Circuit considered MacKay as confined to cases in which th state's highest court was disciplining an attorney. Santos v. Alaska Bar Ass'n., 618 F.2d 575, 576-7 (9th Cir. 1980). MacKay on its facts

was a disciplinary case, 285 F.Supp. 498; but the Court of Appeals used language in affirmation extending to bar admission cases the rule of absence of District Court subject matter jurisdiction based on 28 U.S.C. §1257, which requires direct appeal to the United States Supreme Court from final judgments or decrees rendered by the highest court of a state.

Brown, supra, for the first time clearly expands within the Ninth Circuit the MacKay doctrine as applying to bar admission cases.

This Court has noted that bar disciplinary proceedings are adversary proceedings of a quasi-criminal nature (In re Ruffalo, 390 U.S. 551, 554 (1968)), and involve the state courts in an "adjudicative task" Supreme Ct. of Va. v. Consumers Union, 100 S.Ct. 1967, 1976 (1980), which is certainly not the status of bar admission proceedings, except for character

determinations such as Doe v. Pringle, 550 F.2d 596 (1976), cited in Brown, supra at 609 (which involved refusal to admit based on a prior felony conviction).

In discussing MacKay, the Court in Conover v. Montemuro, 477 F.2d 1073, 1103 (3d Cir. 1973) pointed out that MacKay "turns not on immunity but on scope of review in a disbarment proceeding," and points out:

> "It is perfectly clear that with a population of over 200 million the Supreme Court alone simply is unable to exercise effective appellate jurisdiction over the state judiciary and must for the most part leave vindication of federally protected rights in the hands of the other Article III courts."

The above points to the apparent motive of a desire of the Ninth Circuit to shelter from federal scrutiny and exposure the restrictive practice of most of the state bar associations encompassed by its

area. Of the 14 states as of 1977 that had no provision for admission on motion, eight were in the Ninth Circuit (see Northwestern University Law Review, Vol. 72, No. 5 (1977), "Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys," at p. 748, fn. 52).

In addition to the MacKay device of denying effective review by overloading the docket of this Court, the Idaho State Bar has misused proceedings before this Court in Lathrop v. Donohue, 367 U.S. 820 (1961) when it filed a brief in that case and failed to disclose its tough exclusionary practice toward attorneys attempting to move their practice from sister states to Idaho, such as requiring three full days of examination under rigid speed limitations and graded without regard to the advanced years of the applicant.

It was misrepresentation as to Idaho (and many other of the Western states that filed briefs) to file a brief amicus in Lathrop and to let stand uncorrected the Glaser summary creating the impression of courteous accommodation to attorneys from out-of-state.

> "In eight of the nine states where they administer admissions by student candidates, State Bars also screen attorney applicants coming from other jurisdictions. The Board of Examiners or a Local Administrative Committee performs character investigations; and in a few states the Board of Examiners administers a brief examination concerning state law. The Board of Governors recommends admission to the Supreme Court." Glaser, "The Organization of the Integrated Bar," p. 21, referred to by Mr. Justice Brennan in Lathrop, at p. 843, fn. 16.

The Idaho statutes establishing the integrated bar (Idaho Code §§3-401, et seq., App. 9) set up an organization

with monopoly power because it can exclude competition through its power to conduct examination of applicants (Idaho Code Sec. 3-408) and to fix prices through the threat of its power to discipline those who do not conform to its suggested minimum schedules. Further, the courts of Idaho have enforced the schedule against the public by awarding legal fees based upon the schedule.

The people of Idaho have made no grant of monopoly power to the State of Idaho and all powers not granted are reserved to its citizens (Art. I., Sec. 21, Idaho Constitution, App.10). Confirmation of this is to be found in In re Gemill, 119 P. 298, 313 (1911), which states that creation of monopolies is an unenumerated power reserved to the people. In view of the fact that Idaho had only become a state in 1890, the Chief Justice was knowledgeable as to the meaning of

Article I, Section 21 of the Idaho Constitution at the time the article was adopted.

In the same year, this Court stated in Standard Oil v. U.S., 221 U.S. 1, 52 (1911):

> "The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English Constitution, is known to all and need not be reviewed. . . . Monopoly, as thus conceived, embraced only a consequence arising from an exertion of sovereign power."

It was the dangerous threat emanating from the grant of a monopoly by Parliament to the East India Company (not the tax itself) which precipitated the decisive act leading to the American Revolution, the Boston Tea Party. See "The Spirit of Seventy-Six," by H. S. Commager and Morris, Vol. 1, p. 1 (Bobbs-Merrill, 1958).

Consequently, Standard Oil, supra, stands for the proposition that the consent of the people of the United States would also be required if any government entity, federal or state, desired to establish a monopoly in a matter that would impinge on interstate commerce or the conduct of interstate legal matters (such as consultation with and appearances by Idaho counsel before the Federal District Court in Idaho, including its bankruptcy and maritime activities).

This Court has stated that "no state can endow any of its corporations or any combination of its citizens with authority to restrain interstate commerce." Northern Securities v. U.S., 193 U.S. 197, 350 (1904), cited with approval in Goldfarb v. Va. State Bar, 421 U.S. 773 (1975), and in City of Lafayette v. Louisiana Power, 55 L.Ed.2d 364, 395 (1978).

Consequently, no integrated bar should be permitted to have the power to exclude competition through control of the bar admission examination process. And hence, such a bar should not decide what ameliorative admission procedure should be pursued in a state such as Idaho to apply to the admission of older applicants seeking to transfer their practices from sister states to Idaho. The greater the experience and specialization of the would-be transferees, the more they are a threat to attract legal practice from others already in Idaho, particularly when those legal services have deteriorated or never properly matured as a result of the monopoly (Standard Oil, 221 U.S. at p. 54).

The corruption represented by the Idaho State Bar's preparing and administering the August 1972 admission examination while the bar and its members were

engaged in a conspiracy to restrain competition in the practice of law in Idaho in violation of the Sherman Act, and the approval by the Idaho Supreme Court of the conspiracy after its existence and illegality under federal law were brought to that Court's attention, constituted the fraud in the admission procedures that the Court in Feldman v. State Board, 438 F.2d 699, 703 (8th Cir. 1971) concedes would create a right to suit based on rights protected by the Fourteenth Amendment and constituted the bias condemned in Friedman v. Rogers, 99 S.Ct. 887, 898 (1979).

Brown relies heavily on Feldman, supra and the opinion of the Court of Appeals appealed from herein in its turn relies on Brown.

Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977), cert. den. 435 U.S. 933 (1978), because it involves an action

against the Justices of the Illinois Supreme Court (and the State Board of Law Examiners) by a lawyer admitted to practice in another jurisdiction, is important as a precedent to all phases of the present litigation before this Court, particularly because the District Court therein granted a motion to dismiss and refused to convene a three-judge court, as happened in the District Court in this Action.

As in the present case, the Judges of the Supreme Court of Illinois were named as defendants, and defendants argued the proper procedure should have been an appeal from the Illinois courts directly to the United States Supreme Court (relying upon MacKay).

The Court of Appeals noted (at p. 743) that the bar admission petition proceedings before the Illinois Supreme Court was "ministerial action, not judicial

determination. The denial of his petition was made by the court acting in an administrative capacity.[8/] . . . That denial did not present a case or controversy cognizable by an Article III court," and hence, no appeal directly to the United States Supreme Court was required. Petitioner's appeal herein is from a final order of the Board of Commissioners of the Idaho State Bar (App. 4), which is no more than administrative action.

The Court then considered MacKay v. Nesbett, 412 F.2d 847 (C.A. 9-1969), 285 F.Supp. 498 (1968), and other cases only to point out their conflict with the language in Schware v. New Mexico Bd. of Bar Examiners, 353 U.S. 232, 248 (1957):

8/ In accord, Potts v. Hon. Justices (of Hawaii), 332 F.Supp. 1392, 1395 (1971) and Person v. Ass'n. of Bar, 554 F.2d 534, 537 (C.A. 2-1977), cert. den. 46 L.W. 3293.

> "Admission to practice in a State and before its courts necessarily belongs to that State. Of course, legislation laying down general conditions of an arbitrary or discriminating character may, like other legislation, fall afoul of the Fourteenth Amendment."

It goes on to rule:

> "This is just such a case, in which the rule 'laying down general conditions' is claimed to be discriminatory."

Hence, the action would lie under Section 2281 and the state judges were properly named as defendants therein.

In the present instance, the general rules are alleged to be discriminatory in that they make no allowance for weighting to reflect the speed limitation for older applicants (For details see R-9-12, 197-205, 248-9) that preclude having an unweighted examination procedure effectively determine an older applicant's skill in the law and ability to render adequate legal service to the public in Idaho.

Normally, residents of Idaho take the examination when they are younger and only out-of-state attorney applicants take the examination when they are age 55 or older. Hence, there is no pressure that can be generated via the ballot box in Idaho to correct the situation.

The Court of Appeals in Ktsanes, supra, analyzes the Supreme Court procedures relating to the issue raised herein as to Burt's being entitled to the convening of a three-judge court, and notes (at p. 744):

> "What is important when a classification is challenged on equal protection grounds is whether there is a rational connection between that classification and some legitimate state interest."

As in the present case, the plaintiff in Ktsanes was challenging the rationality of the connection between the classification and the state interest it

reportedly serves. In the present case, Petitioner challenges the lumping together, for admission examination administration purposes, of experienced lawyers over 50 years of age with newly graduated law applicants as an excessive and indiscriminate application of state regulatory power. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Tignes v. Texas, 310 U.S. 141, 147 (1940) (discussed at R-198), states: "The Constitution does not require things which differ in fact. . . to be treated in law as though they were the same," and points to a rule of constitutional stature, even though under Civil Rights Act, that differentiation to achieve fairness is required. Griggs v. Duke Power, 401 U.S. 427, 432 (1971).

In Ktsanes, the Court of Appeals stated in regard to the above:

> "We cannot decide whether plaintiff's situation is

> merely an isolated case of inequality without passing on the merit of his claim. Consequently, that question is reserved for the trial court upon a full consideration of the issue."

And the court granted the request for the convening of a three-judge court, which has been denied by the Ninth Circuit in the present proceedings.

If the claims of the First Cause of Action were sufficiently substantial to warrant remand, they certainly meet the test of substantiality of Goosby v. Osser, 409 U.S. 512, 581 (1973).

The following Federal Circuit Courts of Appeal have considered MacKay and disagreed with its conclusions:

Third Circuit, 1973--Conover v. Montemuro, 477 F.2d 1073, 1103 (1973); Seventh Circuit, 1972--Littleton v. Berbling, 468 F.2d 389, 408 (1972), aff'd. 414 U.S.

812, 1143 (1974). Seventh Circuit again in 1977--Ktsanes v. Underwood, 552 F.2d 740, 743 (1977).

The following circuits agree with MacKay under the special circumstances noted: Tenth Circuit, 1976--Doe v. Pringle, 550 F.2d 596, 599 (involves applicant convicted of felony drug offenses seeking exception in his individual case because a marijuana offense was involved); Fourth Circuit, 1979--Woodward v. Va. Bd. of Bar Examiners, 598 F.2d 1345 (1979) affirms 454 F. Supp. 4, 5 (1978) wherein the District Court cited MacKay .

The Fourth Circuit has split while sitting en banc on issue of whether MacKay principle denied subject matter jurisdiction to the district court. Richardson v. McFadden, 563 F.2d 1131, 1133 (1977), cert. den. 56 L.Ed.2d 59 (1978).

Law Students v. Wadmond, 401 U.S. 154, fn. 9 (1971) indicates that this

Court is unwilling to apply its Theard v. U.S., 354 U.S. 278 (1957) to bar admission challenges based on violation of rights protected by the United States Constitution. Under the Constitution these rights are to be safeguarded by all Article III courts and not subject to the bottleneck of 28 U.S.C. § 1257.

CONSTITUTIONAL ISSUES

In Corfield v. Coryell, 6 Fed. Cases 546, 552 (No. 3, 230), Mr. Justice Washington wrote in 1823 while on circuit that Article IV, Section 2 protects "the right of a citizen of one State. . . to reside in any other State for purposes of . . . professional pursuits." Also see U.S. v. Guest, 383 U.S. 745, 764-70 (1966) relating above right to other portions of the Constitution, such as the Fourteenth Amendment. This is a right

entitled to protection from being nullified or abrogated by a state as part of the state's regulation of the practice of law, Johnson v. Avery, 393 U.S. 483, 490, fn. 11 (1969):

> "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."

Blake v. McClung, 172 U.S. 239, 255 (1898) states:

> "all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

The background and interpretation of Article IV, Section 2 is discussed at length in "The Constitution of the United States--Analysis and Interpretation," Sen. Docu. 179, 82d Cong., 2d Sess. (1953), prepared by the Legislative Reference Service, Library of Congress, for the

guidance of members of Congress and their constituents. The Senate document notes, at page 686:

> "The Comity Clause--Sources--The community of rights among the citizens of the several States guaranteed by this article is traceable to colonial days. It had its origin in the fact that the colonists were all subjects of the same monarch."

As a solicitor admitted to practice under the authority of the Crown, a lawyer was free to practice in any part of the Empire, including free movement between the 13 colonies.

Subsequently, as one Nation under a single Constitution declared by its Article VI to be "the supreme Law of the Land," the right which Corfield v. Coryell, supra recognized as existing under Article IV, Section 2 should have been protected by the Federal Article III Courts; particularly because such courts have held the

Comity Clause to be self-executory with its enforcement depending solely upon the judicial process, not enactment of Congress. U.S. v. Wheeler, 254 U.S. 281 (1920) and discussion at p. 688 of Sen. Docu. 170, supra.

The Bureau of Census figures released as of July 1976 confirm that the Nation has been in the throes of extensive migrations as between states [9/] during the 1970-76 period and that Idaho, with a net gain of 14.9 percent, is near the top of the list for states experiencing net increases of in-flow (see map and data, R-269; Time, March 15, 1976, p. 56, "Americans on the Move"). There is no reason why lawyers should not be encouraged to

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9/ Confirmed by 1980 Census which will result in substantial loss in Congressional seats by States such as New York (estimated 4 seat loss for New York alone, UPI release for December 19, 1980).

migrate along with the rest of the community (R-199; "Commerce Clause Challenge," supra at p. 740, fn. 20).

Furthermore, the Nation is in a desperate struggle to increase the efficiency of its economic activity and to reduce the cost of its exports in order to decrease the enormous deficits in its foreign trade arising from the increase in the price of imported oil, which result in vast exports of dollars and their resultant reduction in purchasing power of the United States dollar abroad. (The Idaho Statesman, June 20, 1978, p. 2A, "OPEC Agrees to Continue Freeze on World Oil Prices," only until Jan. 1, 1979 because of the erosion in the purchasing power of the United States dollar).

All the advanced countries are endeavoring to increase their efficiency and productivity. To this end, the European Common Market has passed a regulation

that will permit its 125,000 lawyers to practice freely in each of the nine countries ("Europe's Lawyers to Span 9 Nations," The Idaho Statesman, Mar. 25, 1977, p. 7A (R-250, 272), reporting on the Council Directive of Mar. 22, 1977 printed in the Official Journal of the European Communities, No. L, 78/17)(App. 11). This directive was issued despite the language differences and variance in legal systems, such as English Common Law and France's Code Napolean. It should be noted that no country may impose any residency requirement on a lawyer from another member country.

United States Federal Courts frequently look to the practices of other advanced societies for guidance in the absence of clear United States precedents. Williams v. Florida, 399 U.S. 78, 86-91 (1970).

Here, we are struggling under the "police power" of 50 states and failing to achieve equal mobility and efficient use of our professional resources, despite the soaring cost of legal service to the people of the Nation (Time "Law" section, p. 59, Apr. 10, 1978, the cover story). Thirty-four states are trying to improve such mobility by admitting out-of-state attorneys to practice on motion (fn. 52, p. 748, "Commerce Clause Challenge," cited above; in addition, see "Lawyers on Defensive," from the Honolulu Advertiser, Aug. 4, 1978, p. A16, App. 12).

The timeliness of the arguments presented herein is emphasized by Chesterfield Smith's article, "Time for a National Practice of Law Act," appearing in the April 1978 issue of the American Bar Association Journal, p. 557, which states on page 560:

> "The chilling of interstate bar admissions is in conflict with the long-range economic interests of the legal profession and the nation. When one state can refuse to give full faith and credit to the order of a court of last resort of a sister state finding a person qualified to practice law, the ability of the legal profession to serve its national clients adequately is substantially and gravely impaired. That one state has chilled the free flow of commerce among the states."

He would invoke application of 28 U.S.C. § 1654 and Article IV, Section 1 of the United States Constitution. While Article IV, Section 1 could be applicable; in fact, Section 2 is also applicable, as is the Commerce Clause.

Petitioner urges that the issues raised herein relating to jurisdiction of the Cause of Action set forth in the Complaint be disposed of on the widest possible

grounds so that the members of any profession will have their rights to move their practice from state to state protected under the United States Constitution, so as to reduce the cost of professional services, including legal services, to the public.

In Bates v. State Bar of Arizona, 433 U.S. 350, 373-4 (1977), the ban on attorney advertising was set aside on Constitutional grounds in furtherance of the objective of reducing the cost of legal services to the public through fee competition in the marketplace.

A press article covering part of the oral argument in Cal. Ret. Liquor Dealers Ass'n. v. Midcal Aluminum, supra, reported questioning by Mr. Justice Rehnquist as to the constitutionality of Virginia State liquor stores. That action involved only a challenge based on the Sherman Act. Petitioner believes In re

Gemill, supra and Standard Oil, supra point to another proper challenge, that the creation of any monopoly (i.e., one not regulated as a public utility) by a state is an exercise of powers never granted by the people, and hence, reserved to the people under the Tenth Amendment to the United States Constitution (and in Idaho, under Article I, Section 21 of its Constitution).

From the facts that the Ninth Circuit denied Petitioner's appeal from a denial by the District Court of Plaintiff's request for the convening of a three-judge District Court by Order dated November 11, 1977 (R-163) denying the Petition for Rehearing on the grounds that:

> "The appeal was dismissed for lack of jurisdiction on the ground that the order from which appelland appealed was not a final order,"

despite the fact that the order contained the statement (R-113) required by

28 U.S.C. §1292(b), and thus, met the requirements of FRAP Rule 5(a) and complied in every respect with Gonzalez v. Automatic, 419 U.S. 90, 100, fn. 19 (1974), and has remanded two causes of action in its Order of October 10, 1980 without passing on the merits of any of the constitutional issues raised and denied again the appeal requesting the designation of a three-judge court, Petitioner concludes that one of the objectives is to stretch out proceedings in this litigation beyond the effective lifespan of Petitioner. This Complaint was filed January 30, 1976 and is still only in its "jurisdiction" phase. Surely, this is a twist to the maxim that justice delayed is justice denied. Keenan v. Board, 319 F.Supp. 1350, 1362 (1970) notes:

> "If a man may be arbitrarily made to give up his lifetime endeavor--even for a year--in order to move his residence,

> it is idle to talk to him about Fourteenth Amendment protection of personal freedom. . . . Even though a one-year exclusion from the practice of law does not foreclose other avenues of employment . . . the desirable, competent attorney is doubtless much deterred from an interstate move by it. He is likely to find true personal fulfillment only in the active practice of the profession to which he has dedicated himself."

JURISDICTION OF LOWER FEDERAL COURTS

Jurisdiction of the Federal District Court was invoked under 42 U.S.C. §§1983 and 1988 and 28 U.S.C. §§1343, 2201 and 2202 and 15 U.S.C. §§15 and 26 in the Complaint, and expanded in the proposed Amended Complaint (R-237 and note at end of Clerk's Index) to include 28 U.S.C. §§1331 and 1337 and directly from the Constitution under this Court's Mt. Healthy doctrine, 97 S.Ct. 568, 572 (1977).

Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

ARGUMENT AMPLIFYING REASONS WRIT SHOULD ISSUE

Rule 17.1(a) is applicable because the decision of the Ninth Circuit for which review is sought is in conflict with Ktsanes opinion, 552 F.2d 740 (1977) of the Seventh Circuit. The conflict is noted in the Ninth Circuit's opinion in Brown, 623 F.2d 605, 610, fn. 10 (1980), the principal authority relied upon by the Ninth Circuit in the opinion for which review is sought.

Ktsanes is in accordance with Lathrop v. Donohue, 367 U.S. 820, 827 (1961) and conforms to this Court's views set forth in S.Ct. of Va., et al. v. Consumers Union, et al., 100 S.Ct. 1967, 1976 (1980), distinguishing judicial acts constituting disposition by final judgment or decree disposing of a case or controversy

by a state's highest court (to which 28 U.S.C. §1257 applies) from other activity of such courts and their judges; the latter being cognizable by all Article III courts. The Ninth Circuit is not only in conflict with the Third and Seventh Circuits (case citations, supra), but has proceeded in a manner at variance with the views of the Supreme Court on the subject of whether the acts of State Supreme Courts are subject to analysis and segmenting as to whether they represent adjudication, legislation, enforcement power, or are merely administrative or ministerial in nature.

In the context of this litigation, the question arises as to whether 28 U.S.C. §1257 applies to federal review of all acts of the Supreme Court of Idaho or merely to those acts that arise from adjudications by that Court. The Ninth Circuit view is that Section 1257 controls as to all acts of the State Supreme

Court and assumes that bar admissions are in effect acts of the State Supreme Court (even though administered by a statutorily independent state bar), and hence, because of Section 1257, lower Federal Courts are without subject matter jurisdiction.

The intervention of the Supreme Court is necessary to assure to residents of all circuits, including those seeking admission to any state bar, that Section 1257 applies only to adjudication activity of State Supreme Courts that result in "final judgments or decrees," and that all Article III Courts have the authority and power to review all other activity by any State Courts (and bar associations) as to conduct rendered impermissible by the United States Constitution (i.e., the Federal District Courts have subject matter jurisdiction, except when action to be reviewed is that of State Supreme Courts involving judgments or decrees arising

from the adjudication of cases or controversies in such State Courts).

Further, it should be made clear by the Supreme Court that all Article III Courts have jurisdiction over all state judges for the purpose of assuring State Court compliance with Article VI, Clause 2, which specifies that "the Judges in every State" shall be bound thereby. As spelled out in the instant proceedings, "prospective relief" may be required, a matter left open in S.Ct. of Va. v. Consumers Union, supra, at p. 1976. The Court of Appeals noted (App. 1), "[W]e believe it premature to pass upon the immunity of the Supreme Court of Idaho," citing and misapplying S.Ct. of Va., supra.

Underlying the procedural issue presented to this Court are issues involving interpretation and application of the United States Constitution which have

not been but should be settled by this Court, such as:

a. Do the powers of the Tenth Amendment (and equivalent in all State Constitutions) reserved to the people confirm that the creation of a monopoly (aside from regulated utilities) by any government, federal or state, is the exercise of an unenumerated power never granted by the people to any government, federal or state?

b. Is greater mobility to move their practice from state to state achievable for lawyers and other professionals under the Commerce Clause or other relevant provisions of the United States Constitution? (See Northwestern University Law Review, Vol. 72, No. 5, p. 737 (1977), "Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys," which cites Goldfarb, supra, and notes, at page 759):

> "There is no reason to subject a practicing attorney who has passed a substantially similar bar examination to the same examination required of recent law school graduates."

Chief Justice Burger has noted that the amounts charged for legal fees are excessive. (News article on American Bar Association proceedings appearing Feb. 4, 1980 in the Honolulu Advertiser, p. B2.) Mobility of lawyers and resulting increased competition will reduce such fees.

c. The Constitutional questions raised in Lathrop v. Donohue, supra (and left unresolved because of the inability to muster a majority as noted in Abood v. Bd. of Education, 431 U.S. 209, 233 (fn. 29) and 246 (fn. 1) (1977)) are raised in this petition and raise urgent problems as to the absence of due process in Idaho state court proceedings because of the usurption by the Idaho State Bar of

the power to itself make determinations that should be made in the trial court as essential to the compiling of a record and the making of determinations based thereon.

d. Federally-financed studies at Harvard have reached the scientific conclusion that beginning at age 50, a professional person's "speed" capability begins to decline (by age 60, seriously so) in matters such as taking written examinations under time pressure; whereas, the same person's mental power and ability may increase beyond 50 (the Chief Justice commented during Mass. Bd. of Retirement v. Murgia, 421 U.S. 972 (1978), as reported 44 L.W. 3354, "lawyers, judges or librarians are not necessarily superannuated at 65.") Consequently, grading the examinations of older persons on the same basis as those recent law school graduates bears no rational relationship

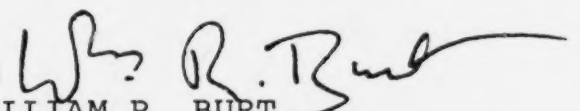
to the ability of the older practitioners to render legal servides in the particular state. The bias is that the state's residents normally take the admission examination while they are young and only out-of-state practitioners take it when they are older.

e. Petitioner's reason for moving his law practice from New York to Idaho was so that he and his wife could be together during their declining years near the grave of their only son in Hailey, Idaho. Their son, William R. Burt, Jr., was killed in Vietnam, after receiving four medals for bravery. Certainly, it is the responsibility of all branches of the Government, including this Court and all courts, to act in a manner that will protect to the degree possible the interests of all citizens suffering from the impact of the war making powers of Congress and the

Commander-in-Chief status of the President, to the end that these powers may be nurtured so that they may be used more effectively in the future, when required. Such honor to those who died bravely in war can be an inspiration for our youths who may be called upon for similar sacrifices in the future.

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Reply Brief was served upon each of the Respondents herein by mailing the same to the following:

For the Idaho State Bar:

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on this 12th day of January, 1981.

William R. Burt
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM R. BURT, Plaintiff-Appellant, v. THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO, et al., Defendants-Appellees.	No. 78-2659 D.C. No. 1-76-22 MEMORANDUM

Appeal from the United States District Court for the District of Idaho
Ray McNichols, District Judge, Presiding
Argued and Submitted August 11, 1980

Before: WRIGHT and SNEED, Circuit Judges, and ENRIGHT*, District Judge

Appellant's complaint was designed to set forth what it alleges to be three causes of action. Although it is not

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation

unreasonable to characterize each as an effort on the part of the appellant to gain admission to the Idaho bar, in fact the theory of each cause is different. Speaking quite generally, the first proceeds under 42 U.S.C. §§ 1983 and 1988 against the Justices of the Idaho Supreme Court and certain officials of the Idaho State Bar and complains that certain statutes and rules governing admission to the Idaho bar deprive the appellant and "those similarly situated" of certain constitutional rights. The second very largely repeats the first, but omits any claim on behalf of a class of "those similarly situated." The third also incorporates much of the first, together with some additional allegations, and seeks relief under the Sherman Act.

The district court dismissed the entire complaint for want of federal

jurisdiction and, with respect to the Justices of the Supreme Court of Idaho, because of their immunity from liability. We reverse and remand with respect to the first and third cause of action. In doing so we express no opinion with respect to the merits of these two causes of action.

The principal authority for our action is Brown v. Board of Bar Examiners of the State of Nevada, et al., ____ F.2d ___(9th Cir. 1980) [C.A. No. 79-4529]. There we distinguished between "a constitutional challenge to the state's general rules and regulations governing admission" and a claim that a state wrongfully denied a particular applicant admission without regard to the basis on which the individual claim is based. Id., slip op. at 4229. Only with respect to the first does the district court have jurisdiction. Id.

The second is governed by MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969), cert. denied, 396 U.S. 960 (1969). We hold that appellant's first cause falls within the category of cases over which the district court has jurisdiction, while his second is governed by MacKay v. Nesbett, supra.

With respect to appellant's third cause of action, jurisdiction exists under 28 U.S.C. § 1337 and 28 U.S.C. § 2201.

Finally, we believe it premature to pass upon the immunity of the Justices of the Supreme Court of Idaho in the light of Supreme Court of Virginia v. Consumers, Union, ____ U.S. ____(1980), 100 S. Ct. 1967.

Reversed and Remanded.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM R. BURT, Plaintiff-Appellant, v. THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO, et al., Defendants-Appellees.	)	No. 78-2659 ORDER

Before: WRIGHT and SNEED, Circuit Judges and ENRIGHT*, District Judge

Appellant's petition for rehearing is denied. All other relief sought by appellant in his motion filed October 22, 1980 also is denied.

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*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WILLIAM R. BURT, Plaintiff, v. THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO, et al., Defendants.	Civil No. 1-76-22 JUDGMENT OF DISMISSAL

MOTIONS FOR DISMISSAL on behalf of all defendants having been presented to this Court and plaintiff having responded thereto, a hearing having been held on March 17, 1978, in which arguments in support of and in opposition to said Motion were heard, Conrad Aiken and William Burt appearing on behalf of the plaintiff; Edward W. Rich of the firm of Elam, Burke, Jeppesen, Evans & Boyd appearing on behalf of defendants Idaho State Bar, Gerald W. Olson, Thomas A. Mitchell, Louis H. Cosho, Mack A. Redford, Dean E. Miller, John M. Sharp, John H.

Bengtson, Thomas G. Nelson, Ronald L. Kull and Robert E. Rayborn; and Howard Humphrey of the firm of Clemons, Cosho, Humphrey & Samuelsen appearing on behalf of defendants the Idaho Supreme Court and its Justices; the Court being fully advised in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the present action be dismissed with prejudice with respect to all defendants, on the ground and for the reason that this Court lacks jurisdiction over the subject matter of the complaint; with respect to the Idaho Supreme Court and its Justices, the action is dismissed upon the additional and further ground that said Justices are protected by immunity. No costs assessed.

DATED This 21st day of March, 1978.

/s/ Ray McNichols
United States District Judge

NOTICE OF REJECTION OF APPLICANT

To William R. Burt
of Hailey, Idaho

Application and Applicant No. A-1443

YOU ARE HEREBY NOTIFIED that your application to practice law within the State of Idaho was on the 23rd day of Sept., 19 72, denied by the Board for the following reason

Failure to Pass the Idaho State Bar Examination

Dated this 25th day of September, 19 72.

BY ORDER OF COMMISSIONERS OF THE IDAHO STATE BAR

By _____ Secretary.

ADVISORY FEE SCHEDULE
of the
IDAHO STATE BAR
(July 1971 Revision)

GENERALLY

In cases of financial hardship where justice requires representation by counsel, a lawyer is at liberty to deviate from or ignore the following recommendations.

It is unethical for an attorney to represent a client for an unreasonable fee. In cases of unreasonable low fees, amongst other things, an attorney is guilty of unethical solicitation of practice.

The basic consideration in setting a fee should be a fair evaluation of the services rendered and the skill and efficiency of the lawyer in the representation of his client.

TIME RATES

Normally an attorney should, regardless of other considerations, fix a fee at least consistent with the following recommended hourly rates:

0 to 2 years practice	$15.00 to $25.00 per hour
2 to 5 years practice	20.00 to 30.00 per hour
5 to 10 years practice	30.00 to 50.00 per hour
10 years practice and over	35.00 to 75.00 per hour

Higher hourly rates should be set in consideration of particular experience, unusual skill or practice with specialties.

Where representation requires absence from office for entire day, a per diem of six to eight times one's hourly rate is advised or total hours times the appropriate rate, whichever is the greater.

Where service is required during night hours, week ends or holidays, attorneys are advised that hourly rates should be adjusted to 150% to 200% of the normal rate, consistent with circumstances surrounding such service.

EXPENSES

Costs and expenses actually and reasonably incurred in rendering legal service should always be charged over and above the fee charge. They should normally be obtained in advance as retainer.

RETAINERS

Clients represented on a retainer should be charged a reasonable fee generally consistent with the rates represented by this schedule, though it is recognized that this will be a matter of general evaluation by the individual attorney. It remains unethical, whether representing a client on a fee or retainer basis, to charge unreasonably low fees for services rendered.

SPECIFIC FEES AND MATTERS

Introduction

THE FOLLOWING SCHEDULE IS ADVISED SUBJECT TO THE CONDITION THAT WHERE AN ATTORNEY'S CHARGE ON A TIME BASIS WOULD EXCEED THE RECOMMENDED FIGURE, THE HIGHER FEE SHOULD BE CHARGED.

The figures hereafter set forth contimplate only the customary or ordinary activities and where extraordinary requirements are encountered, additional fees should be charged.

I. U. S. COURT OF APPEALS

Appearance, brief and oral argument	$2,000.00

II. STATE SUPREME COURT

Appellant: Taking Appeal Briefs and argument	1,300.00
Respondent: Appearance, Brief and argument	1,000.00
Petition for rehearing	250.00
Petition for rehearing and arguments	350.00
Original proceedings	1,000.00

III. STATE AND FEDERAL DISTRICT COURT

A. Drafting pleadings	
Drafting complaint	150.00
Drafting defense appearance	100.00
B. Motion practice	
Drafting ordinary motions	100.00
Drafting motion for summary judgment and supporting documents	200.00
Drafting motion for new trial, amended findings and conclusions, or judgment notwithstanding the verdict	150.00
Court attendance—contested—on any motion, exclusive of drafting and research	100.00
Court attendance—uncontested—on any motion, exclusive of drafting and research	75.00
C. Change of venue	
Drafting motion on defendant's residence	100.00
Drafting motion on convenience of witnesses	150.00
D. Discovery practice	
Oral Depositions (Exclusive of preparation, notices, etc.)—attendance and participation	100.00
Written interrogatories—drafting questions or answers	50.00
E. Pre-trial conference	
Drafting required memoranda, if any, with Court appearance and participation in conference (exclusive of general preparation to be billed at no less than time charge) minimum	200.00
F. Third party practice	
Same as original proceedings	

G. Trial

For day or part thereof—Court or jury 250.00

H. Dissolution of partnership or corporation 225.00

I. Divorce

Default without custody or property provisions 225.00
Default with custody and/or property provisions 300.00
Defense—without appearance—negotiating settlement 225.00
Contested case—either party—per diem and time charge and not less than 500.00
Modification of decree not involving custody 225.00
Modification of decree, involving custody 350.00
NOTE: Because terms of payment may be as significant as amounts, at least 50% of the recommended minimum should be required and received at the commencement of representation and the entire balance required and received prior to adjudication.

J. Foreclosures

Chattel mortgage and Mechanic's lien: (default)

first	$ 1,000	or part—20%)	or
next	1,000	or part—15%)	$150.00
next	1,000	or part—10%)	whichever
all over	3,000	— 5%)	is greater

Real estate mortgage (default)

first	$10,000	or part—10%)	or
second	10,000	or part— 7%)	$250.00
third	10,000	or part— 5%)	whichever
all above	30,000	— 3%)	is greater

(Deficiencies shall be collected as retail collection accounts and as an additional matter.)

Trust deed, foreclosure by action:

first	$10,000	or part—10%)	or
second	10,000	or part— 7%)	$250.00
third	10,000	or part— 5%)	whichever
all above	30,000	— 3%)	is greater

Conditional sales contract (same as contingent fees—damage cases)

Claim and delivery, minimum retainer 250.00

K. Condemnation

50% of net recovery over amount offered by condemning authority

IV. JUSTICE'S AND PROBATE COURT PRACTICE

Appearance ..... $ 75.00
Trial, per diem 250.00
Preliminary hearing, per day 200.00
Drunken and reckless driving and non-traffic misdemeanor cases, with or without jury, per day .. 250.00

Insanity proceeding (except by court appointment) 250.00
Youth Rehabilitation Act, appearance and hearing, per diem of 150.00
Appeal, perfecting (civil or criminal) 75.00

COURT MATTERS

A. Adoption: Related 125.00
Non-related 175.00

B. Termination of Parent Child Relationship 175.00

C. Guardianship 175.00
Annual account 60.00
Minor's compromise settlement 150.00

D. Decedent's Estates

(1) Probate

To be based on all the separate property, all the community property up to $10,000, and one-half the remaining community property—

first ..... $ 1,000—7%
next ..... 4,000—5%
next ..... 5,000—4%
over ..... 10,000—3%

The probate of any estate shall be subject to at least $300.00 attorney's fee.

Additional charges shall be made for extra ordinary services or when estates must be probated over an extended period of time. Also, since settlement of decedents' affairs may entail many functions in addition to probate of estates, i.e., tax determination of trusts, life insurance, settlement options, and other such matters, additional charges should be made for these services.

(2) Short form procedures:
Determination of heirship after two years, and community property upon wife dying intestate ¼ regular fee or $300.00, whichever is greater.

(3) Inheritance tax determination 300.00

(4) In an appropriate case a fee may be prepared on the basis of the actual time devoted to such case rather than figure on the above percentage and the lesser of the two figures may be charged.

V. ADMINISTRATIVE PRACTICE

Federal and State—Conference or hearing—per diem 250.00
County or City—Conference or hearing—per diem 200.00

VI. BANKRUPTCY

A. Voluntary
1. Uncontested, no assets and not in business 300.00
2. Uncontested, in business or with assets 500.00
3. If wife included, add 50% of regular charge

B. Involuntary
1. Petition and first meeting of creditors 350.00
2. Additional, on per diem or hourly basis

C. Petition for Reorganization
1. Petition and first meeting 400.00
2. Additional, on per diem or hourly basis
3. Litigation on District Court basis

D. Preparing, Filing and Presenting Creditor's Claim 35.00

E. Preparing, Filing and Presenting Objection to Discharge 225.00

F. Defending Objection to Discharge 175.00

G. Wage Earners, Special Proceedings 350.00

VII. COLLECTIONS—CONTINGENT FEES

First $5,000—without litigation ..... 25% to 33⅓%
First $5,000—with litigation ..... 33⅓% to 50%
Fees on collection in excess of $5,000 subject to arrangement between counsel and client

VIII. DAMAGE ACTIONS—CONTINGENT FEES—CLAIMANT'S COUNSEL

Settled without action being filed 25%
Settled after action, but more than one week before trial 30%
Settled after action, but within one week of, during or after trial 33⅓%
Settled upon appeal or following post-verdict proceedings 40%

IX. WORKMEN'S COMPENSATION PROCEEDINGS—CONTINGENT FEES

No offer—settlement prior to day of hearing 25%
No offer—settled on day of, during or following hearing, or by Board ruling ..... 35% to 40%
Offer made—settled prior to day of hearing ..... 33⅓% of recovery in excess of offer
Offer made—if settled on day of, during or following hearing, or by Board ruling ..... 50% of recovery in excess of offer or 25% of entire award, whichever is less
Note: Contingent fees charged should take into account all payments enforced against employer

including payments of compensation and of hospital, medical and related expenses.

X. OFFICE PRACTICE

A. Corporations—No Public Offering Involved:

Organizing, through first meeting of stockholders and directors—existing business	00.00
Organizing, through first meeting of stockholders and directors—new business	350.00
(Note: add $5.00 to the organization fee for each $1,000 of capital or assets to be employed in excess of $5,000)	
Dissolution	275.00
Amendment of articles	200.00
Merger—closely held—common ownership	750.00
Annual meetings and minutes	75.00
Qualifying to do business in another state	75.00

NOTE: Incidental agreements amongst shareholders, officers and/or directors are additional matters for which supplemental fees are in order.

B. Drafting Instruments (exclusive of consultation time)

(1) Deed—simple	$ 25.00
(2) Bill of sale	25.00
(3) Assignment of contract and deed	50.00
(4) Lease	65.00
(plus 1½% of total rent over $6,000.00)	
(5) Trust deed, including note	35.00
(6) Power of Attorney	
Special	40.00
General	25.00
(7) Lien, preparation and filing	40.00
(8) Mortgage and note	35.00

(9) Contract of Sale—Realty or otherwise, $75.00 or ½ of 1% of the purchase price, whichever is greater, or, if representing party but not drafting papers, $25.00 or ¼ of 1% of the total purchase price, whichever is greater; and if no licensed real estate broker participates in transaction, then $50.00 or 1% of purchase price, whichever is greater, or, if representing party but not drafting papers, then $25.00 or ½ of 1% of purchase price, whichever is higher. If transaction involves in excess of $100,000, the fee in excess amount should be subject to negotiation consistent with responsibility, time and skill required of counsel.

(10) Bulk sale compliance ..... $ 65.00

(11) Will: Simple 35.00
(Additional charge if trust, life estate, remainder, tax planning or other additional matters involved)

(12) Partnership Agreement

(a) General partnership—simple 150.00

(b) Limited partnership—simple 275.00

Note: add to the above fees the sum of $5.00 for each $1,000 of assets involved in excess of $5,000.00. If a buy or sell agreement is included, or if special tax or other problems are involved, the fee should be increased.

C. Consultation—incidental or brief

(1) Telephone ..... $ 10.00

(2) Office—under 20 min. 15.00

(3) Home—under 20 min. 25.00

D. Trust Deed—foreclosure—

by Notice and Sale (without litigation), ½ to ¾ of fee for probate of decedent's estate in amount of balance due, or $200.00, whichever is greater.

NOTE: Retainer arrangements leading to lesser net fees for such services are improper.

August 30, 1971

Mr. William R. Burt
Deer Creek Ranch
Hailey, Idaho 83333

Re: Van Houten vs. Burt et al

Dear Mr. Burt:

I have received your letter of August 26, 1971, and have lodged the same in the file and forwarded a copy to the Commissioner of the Idaho State Bar.

If you wish to lodge a complaint it should be with them. Under I.C. 3-408 and Rule 1 of appellate rules of the Supreme Court of the State of Idaho the investigation is with the Bar Commission with approval of the Supreme Court.

As such I don't have the power to institute the investigation you suggest. I don't intend to lodge a complaint by my sending a copy to the Bar Commission. For a complaint to receive effect it should be filed by you.

Sincerely,

/s/ Francis J. Rasmussen
Francis J. Rasmussen
District Judge

FJR/jka

(Copy of original in record at R-327; also p. 290 in Record on Appeal in Van Houten.)

BOARD OF COMMISSIONERS
OF THE
IDAHO STATE BAR

November 10, 1972

Mr. William R. Burt
Deer Creek Ranch
Hailey, Idaho 83333

Dear Mr. Burt:

Thank you for your letter of November 8, 1972.

Because we are active parties in pending litigation, I feel it improper for me to write you further with reference to your complaint against Mr. Lloyd Walker.

The order of the Bar Commission dated October 26, 1972 is in accordance with the decision of the Bar Commission. As I told you subsequently, we will again consider your complaint after all pending litigation has been terminated.

Very truly yours,
IDAHO STATE BAR

/s/ John M. Sharp
John M. Sharp

JMS:cjn
CC: Mr. Ronald Kull
Mr. Edward Benoit
Mr. John Bengtson
Mr. Thomas Nelson
Mr. Eugene Thomas

(Copy of original
in record at R-264)

STATE OF IDAHO
RULES
of
THE SUPREME COURT
and
THE BOARD OF COMMISSIONERS
of the
IDAHO STATE BAR
Governing
Admission to Practice Law
Appearances by Non-Resident
Attorneys
House Counsel Certificate
Limited Licensure of Legal Interns

As adopted by the Board and approved by the Supreme Court of Idaho, effective January 9, 1955, as revised and amended October 24, 1970 and June 24, 1971.

Rule 101. All admissions to the Bar of the State of Idaho shall be in accordance with the procedure set forth herein.

Rule 102. Eligibility Requirements.—Each applicant shall show to the satisfaction of the Board that he (1) is a citizen of the United States, (2) is 21 years of age or over, (3) possesses the requisite general and legal educational qualifications hereinafter prescribed, (4) is a person of good moral character and (5) is now a resident or intends immediately to become a resident of the State of Idaho and intends to engage in the practice of law in the State of Idaho.

Rule 103. Educational Qualifications.—Except as provided in Rule 104 all applicants shall be required to show graduation from a law school fully approved by the American Bar Association. Proof of applicant's eligibility under this section shall be made by filing with the Executive Director at the time of filing application a duly authenticated copy of his transcript or transcripts of credits covering his law school.

Rule 104. Attorney Applicants.—Any person admitted to practice before the highest court of another state or of any jurisdiction where the Common Law of England constitutes the basis of jurisprudence and who has been actively engaged in the practice of law as his principal occupation in any such jurisdiction or jurisdictions for not less than 5 years within the last 7 years immediately preceding the filing of his application may apply for admission to the Idaho State Bar. Such attorney applicant shall be required to meet the eligibility requirements set forth in Rule 102 relating to citizenship, age, residence in this state and moral character and shall intend to engage in the practice of law in this state. Teaching in a law school fully approved by the American Bar Association and

service as a Judge of a court of general or appellate jurisdiction of any state or federal court in the United States shall upon request be considered as practice within the meaning of this rule. Such person upon request shall present duly authenticated certificates from the highest courts of each of the states in which he has been admitted at any time showing the fact of admission, the date thereof and that he is still in good standing therein. Such attorney applicants shall further meet the requirements of Rule 105.

Rule 105. (A). Examination Required.—No person shall be admitted to practice law in this state until he shall have applied for permission to take and shall have successfully passed a bar examination.

(B.) Times of Examination.—Bar Examinations shall be conducted in April and September of each year on such days and at such places as shall be fixed by the Board. The Board may, in its discretion, advance or postpone any examination to any day within the two preceding or following months.

Rule 106 (A). Application—Contents—Form.—Every applicant for admission to practice law in the State of Idaho shall file an application for admission and shall contain such information relating to the applicant's age, residences, addresses, citizenship, occupations, general education, legal education and moral character, as the Board of Bar Commissioners may require. The Board may also require applicants to furnish one or more sets of fingerprints. The form of application shall be prescribed by the Board and the Executive Director shall furnish the same to applicants upon request.

(B.) Time for Filing of Applications.—An application for permission to take an examination shall be filed in the office of the Executive Director at least 60 days next preceding the commencement date of the examination. The Board shall not consider an application filed after the times herein fixed unless it be accompanied by applicant's affidavit showing justifiable cause for failure to make timely filing. The Board shall reject any late application when consideration thereof may make thorough character investigation of the applicant impracticable or interfere with the established procedure of the Board in the preparation or administration of the examination.

(C). Fees.—Each applicant shall at the time of filing his application pay to the Executive Director an examination fee of $75.00. Applicants who have been admitted to practice law elsewhere and have there engaged in the practice, shall, at the time of filing application, pay to the Executive Director additionally, an investigation fee of $100.00.

(D). Refunds.—No refund of an examination or investigation fee shall be made.

Rule 107. Investigation of Applicants.—The Board will make, or cause to be made, an investigation of each applicant's moral char-

shall be given said applicant setting forth the reasons therefor. Procedure and grounds for review by the Supreme Court are set forth in Rule 112.

Any applicant who failed, upon written request to the Executive Director, may examine his examination papers and grades, at the Idaho State Bar office, but no examination question shall be duplicated, copied or removed from the Bar office. Thirty (30) days following mailing of notices of failure the Executive Director shall destroy all examination papers, unless an appeal has been filed by one or more of the applicants. In the case of an appeal, the Executive Director shall destroy all examination papers thirty (30) days after a final determination of the petition for review has been made by the Idaho Supreme Court.

Rule 112. (A). Review by Supreme Court—Any applicant may petition the Supreme Court for review of any decision of the Board issued under Rule 108 and under Rule 111, if within a period of twenty (20) days from the date of the mailing of the required notice pursuant to rule, the applicant shall file a verified petition for review, together with five (5) copies, with the Clerk of the Supreme Court, accompanied by a certificate showing service on the Executive Director of four (4) copies of the petition. A filing fee of $12.00 as provided by I.C. Section 1-402 and an additional fee of $3.00 as provided by I.C. Section 1-2003 shall be paid to the clerk.

(B) Grounds for Review—Such petition shall only be reviewable by the Supreme Court if it is alleged that through the arbitrary, capricious or malicious action of the Board of Commissioners, such applicant (1) was denied a certificate permitting examination under Rule 108, or (2) was denied a passing grade by the Bar examination, or (3) was denied a certificate of eligibility for admission upon any other grounds, which allegations in said petition shall set forth with particularity the alleged acts of the Board upon which said petition for review is based.

(C) The Board of Commissioners may, within twenty (20) days after such service upon the Executive Director of the four (4) copies of the petition for review, or within such further time as the Court may grant, serve upon the applicant and file in the Court an answer. If any such answer is served and filed, the applicant may, within fifteen (15) days thereafter or within such further times as the Court may grant, serve and file a reply thereto.

(D) The Supreme Court shall make its determination from the pleadings filed within the time provided or the court may order a hearing thereon for purposes of receiving additional evidence or arguments upon such issues as may be specified by the Court.

(E) Any applicant filing petition for review shall have the burden of establishing to the satisfaction of the Supreme Court the allegations contained in his petition.

3-401. Purpose of chapter.--
Recognizing that the practice of the legal profession is a privilege granted by the state and not a natural right of the individual, it is deemed necessary as a matter of business policy and in the interests of the public to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the bar.

3.402. Establishment of board--
Members--Term of office--Appointment--
In order to more effectively carry out the purposes and intents of this act, there is hereby established in the department of self-governing agencies a board of commissioners of the Idaho State Bar, consisting of five (5) members to hold office for a term of three (3) years each and until their successors are elected and qualify, and to be appointed in the manner hereinafter provided. There shall be one (1) member of the board of commissioners from each [of] the northern, eastern and western divisions of Idaho, and two (2) members of the board of commissioners from the central division. Each commissioner must be a member of the Idaho State Bar residing within the division from which he is selected at the time of his appointment and during his term of office.

3-403. Time and manner of appointment. --The board of commissioners shall be appointed by the resident members of the Idhao State Bar who shall vote by ballot. The candidate from any division receiving the greatest number of votes of that division shall thereby be appointed commissioner from such division. Only residents of a division may vote for candidates for commissioner of that division. The ballots shall be deposited in person or by mail with the secretary of the board, or such other officer as it may designate. There shall be an annual election by the resident members of the Idaho State Bar for the purpose of appointing successors to the commissioners whose terms expire. A commissioner shall be appointed during 1974 and every third year thereafter from each the northern and central divisions; during 1975 and every third year thereafter from each the western and central divisions; and during 1976 and every third year thereafter from the eastern division. The board shall fix the time for holding the annual election and prescribe rules and regulations in regard thereto not in conflict with the provisions of this act. The board shall, in accordance with its rules, give at least sixty (60) days' notice by mail of the time for holding the election each year. In the event a vacancy shall occur on said board otherwise than by expiration of the term of a commissioner, such vacancy shall be filled by appointment by the remaining members of said board. Such vacancy shall be so filled from the members of the bar resident in the division where such vacancy occurs.

3-405. Member of the Idaho State Bar defined.--All persons who have been heretofore, or shall hereafter be, duly admitted to practice law before the Supreme Court of this state, and who have not been disbarred or suspended therefrom, and who shall have paid the license fee in this Act provided for, and all judges of the district and Supreme Courts of this state, and of the district court of the United States for Idaho, are hereby declared to be members of the Idaho State Bar.

3-408. Admission to practice and disbarment proceedings --Rules and by-laws--Power of board to adopt--Supervisory power of Supreme Court.--The board of commissioners shall have power to determine, by rules, subject to the approval of the Supreme Court, the qualifications and requirements for admission to the practice of the law and to conduct investigation and examination of applicants, and it shall from time to time certify to the Supreme Court the names of those applicants found to be qualified. The approval by the Supreme Court of the applicants whose names are so certified, shall entitle them to enrollment, as members of the bar of this state, and to practice law upon their paying the required fees and taking the oath. The board shall formulate rules governing the conduct of all persons admitted to practice and shall investigate and pass upon all complaints that may be made concerning the professional conduct of any person admitted to the practice of the law. In all cases in which the investigation, in the opinion of a majority of the board, justifies such a course, it

shall recommend to the Supreme Court such disciplinary action by public or private reprimand, suspension from the practice of the law, or exclusion and disbarment, therefrom, as the case shall in its judgment warrant. Upon the making of any recommendation by the board reprimanding, suspending, or excluding or disbarring any member of the Idaho State Bar from the practice of the law, the board shall cause the record of proceedings in said matter or a copy thereof certified by its secretary or president to be filed with the clerk of the Supreme Court. The Supreme Court shall thereupon enter such judgment in said matter as it deems proper. The board of commissioners shall also have power to make rules and by-laws, subject to the approval of the Supreme Court, not in conflict with any of the terms of this Act concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the board and of the Idaho State Bar.

The board of commissioners shall also have power after proceedings as in other cases of discipline to recommend to the Supreme Court the discipline of its officers and the members of its committees in the event of refusal, neglect, failure or corrupt or wrongful performance of their respective duties.

25 Am. Jur. 2d, Elections, § 79.
29 C.J.S., Elections, § 28.

§ 21. Reserved rights not impaired. — This enumeration of rights shall not be construed to impair or deny other rights retained by the people.

COUNCIL DIRECTIVE

of 22 March 1977

to facilitate the effective exercise by lawyers of freedom to provide services

(77/249/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Whereas, pursuant to the Treaty, any restriction on the provision of services which is based on nationality or on conditions of residence has been prohibited since the end of the transitional period;

Whereas this Directive deals only with measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services; whereas more detailed measures will be necessary to facilitate the effective exercise of the right of establishment;

Whereas if lawyers are to exercise effectively the freedom to provide services host Member States must recognize as lawyers those persons practising the profession in the various Member States;

(1) OJ No C 103, 5. 10. 1972, p. 19 and OJ No C 53, 8. 3. 1976, p. 33.
(2) OJ No C 36, 28. 3. 1970, p. 37 and OJ No C 50, 4. 3. 1976, p. 17.

Whereas, since this Directive solely concerns provision of services and does not contain provisions on the mutual recognition of diplomas, a person to whom the Directive applies must adopt the professional title used in the Member State in which he is established, hereinafter referred to as 'the Member State from which he comes',

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

2. 'Lawyer' means any person entitled to pursue his professional activities under one of the following designations:

Belgium:	Avocat — Advocaat
Denmark:	Advokat
Germany:	Rechtsanwalt
France:	Avocat
Ireland:	Barrister Solicitor
Italy:	Avvocato
Luxembourg:	Avocat-avoué
Netherlands:	Advocaat
United Kingdom:	Advocate Barrister Solicitor.

Article 2

Each Member State shall recognize as a lawyer for the purpose of pursuing the activities specified in Article 1 (1) any person listed in paragraph 2 of that Article.

Article 3

A person referred to in Article 1 shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State.

Article 4

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

3. When these activities are pursued in the United Kingdom, 'rules of professional conduct of the host Member State' means the rules of professional conduct applicable to solicitors, where such activities are not reserved for barristers and advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, barristers from Ireland shall always be subject to the rules of professional conduct applicable in the United Kingdom to barristers and advocates.

When these activities are pursued in Ireland 'rules of professional conduct of the host Member State' means, in so far as they govern the oral presentation of a case in court, the rules of professional conduct applicable to barristers. In all other cases the rules of professional conduct applicable to solicitors shall apply. However, barristers and advocates from the United Kingdom shall always be subject to the rules of professional conduct applicable in Ireland to barristers.

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

Article 5

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

— to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;

— to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an 'avoué' or 'procuratore' practising before it.

Article 6

Any Member State may exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities.

Article 7

1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

Article 8

1. Member States shall bring into force the measures necessary to comply with this Directive within two years of its notification and shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 9

This Directive is addressed to the Member States.

Done at Brussels, 22 March 1977.

For the Council

The President

Judith HART

Honolulu Advertiser
Aug. 4, 1978, p. A-16

LAWYERS ON DEFENSIVE

By: Richard L. Worsnop
Editorial Research Reports

So far, 1978 has been a trying year for the American legal profession. Chief Justice Warren E. Burger told the midyear meeting of the American Bar Association in February that one-third to one-half of the nation's trial lawyers are incompetent.

A cover story in the April 10 issue of Time magazine examined the causes of rising popular resentment against lawyers in general. And in a speech before the Los Angeles Bar Association on May 4, President Carter told the assembled attorneys that their profession had contributed heavily to unequal justice in the United States.

THE PRESIDENT'S remarks were unusually sharp. "We have the heaviest concentration of lawyers on earth — one for every 500 Americans: three times as many (per capita) as are in England; four times as many as are in West Germany; 21 times as many as are in Japan. We have more litigation; but I am not sure that we have more justice. No resources of talent and training in our society, even including . . . medical care, (are) more wastefully or unfairly distrubuted than legal skills."

Carter's speech drew a tartly worded response from ABA President William B. Spann Jr. "Will President Carter," he asked, "with the resources of the federal government at his fingertips, be able to speed up the (legal) process without destroying either the right of the people to be heard or (be) telling lawyers when and where to practice and for what fees? Will he limit access to law schools?"

Many attorneys acknowledge that their legal

education left them ill-prepared to practice law. This, at any rate, was the chief finding of a survey of 1,600 alumni of six law schools, conducted earlier this year by the Educational Testing Service. Of those graduates, all of whom were practicing attorneys, 60 percent said their education had not prepared them to investigate facts. Moreover, 69 percent indicated they had not learned how to counsel clients.

"In large measure, this apparent inadequacy of legal training is the result of state bar requirements," commented Joel Seligman, an assistant law professor at Northeastern University. "Besides leaving untested the ability of aspiring attorneys to perform some basic skills of their profession, bar exams only superficially test knowledge of the easier areas of modern law practice."

ALL AREAS OF modern law practice are constantly expanding as new laws are passed and new regulations are issued at every level of government. The result, Time observed, has been "an all-pervasive invasion by courts, laws and administrative agencies into areas that had had previously been ruled by custom, practice or plain old-fashioned private accommodation."

Thus, many lawyers argue, government should bear the main responsibility for creating many of the abuses of which the legal profession stands accused. If governments showed more restraint in legislating and rule-making, the trend toward an oppresively legalized society would be checked. And few people would object to that.

REGULATION OF COMMERCE 1 § 8, cl. 3

Section 8, Clause 3. Regulation of commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

ARTICLE IV.—STATES—RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

SUPREME LAW OF LAND 6, cl. 2

ARTICLE VI.—DEBTS VALIDATED. SUPREME LAW OF LAND

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal;/

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

28 U.S.C.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.